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DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION

[Docket No. 10-54]
ZHIWEI LIN, M.D.
DECISION AND ORDER

On September 19, 2011, Administrative Law Judge (ALJ) Timothy D. Wing issued the attached recommended decision (also ALJ). Therein, the ALJ found that Respondent is currently without authority to dispense controlled substances in California, the State in which he practices medicine and holds his DEA Registration and therefore recommended that his registration be revoked. Thereafter, Respondent filed two motions¹ and the Government filed a response to the motions. Having reviewed the record in its entirety including the ALJ's recommended decision and the various pleadings, I have decided to adopt the ALJ's rulings, findings of fact, conclusions of law, and recommended order, except as noted below.

Following the receipt of Respondent's request for a hearing, the ALJ commenced pre-hearing procedures and issued an Order for Prehearing Statements. The Order clearly stated "that in the case of a motion, the non-moving party shall have until 4:00 pm EDT three business days after the date of service of any motion to file a responsive pleading" and that "[i]n the absence of good cause failure to file a written response ... will be deemed a waiver of objection." ALJ at 2-3² (citing Order for Prehearing Statements, at 3).

On September 12, 2011, the Government filed a Motion for Summary Disposition, asserting that on July 28, 2011, the Medical Board of California (MBC) had issued an Interim

¹ The motions were titled "Motion for Reconsideration – Opposition for Summary Disposition" and "Amended Motion for Reconsideration – Exceptions to Order of Summary Disposition."

² All citations to the ALJ's decision are to the slip opinion.

Suspension Order against Respondent's medical license, and that consequently, Respondent no longer has authority to handle controlled substances in California, the jurisdiction in which he maintains his DEA registration. Mot. for Summ. Disp., at 1. The Government served the motion by both first class mail and facsimile. See id. at 3. When, by September 19, 2011, Respondent had not filed a response to the Government's motion, the ALJ issued his recommended decision finding that because Respondent was currently without authority under California law, he was not entitled to hold his DEA registration. ALJ at 4. The ALJ thus recommended that I revoke Respondent's registration. Id. at 5.

On September 20, 2011 Respondent filed a pleading titled Motion for Reconsider[sic] - Opposition for Motion for Summary Disposition (hereinafter, Motion for Reconsideration). On the same day, he also filed a document entitled Amended Motion for Reconsideration – Exceptions to Order of Summary Disposition – Opposition to Motion for Summary Disposition (Amended Motion).

In both motions, Respondent asserted that he had good cause for having failed to timely file a response to the Government's Motion for Summary Disposition within the time for filing a response. More specifically, Respondent's attorney stated that he did not see the faxed copy sent by the Government to his office on September 12, 2011 because he was in trial at the time and was receiving voluminous items of evidence by fax during that time. Motion for Reconsideration, at 1-2. See also Amended Motion at 1-2. Respondent's attorney further stated that the mailed copy of the Government's Motion for Summary Disposition was not received in his office until September 16, 2011, and that because of his trial obligations he did not actually see the Government's Motion until September 19, 2011, by which date the time for filing his opposition to the motion had expired. Id. at 1-2.

Respondent's Amended Motion also asserted good cause to set aside the Order for Summary Disposition, stating that the finality of the MBC's Suspension Order should be questioned. Id. at 3-4. In the motion, Respondent argued that the Order to Show Cause and the MBC's Interim Suspension Order "are based largely on an assertion that Respondent began prescribing Vicodin to [a] DEA Special Agent [who acted in an undercover capacity (UC)] without an adequate examination." Id. at 2. Respondent asserted that the audio recording evidence of the initial appointment between the UC and Respondent was incomplete and contained a number of serious abnormalities that preclude authentication. Id. at 3. Respondent contended that the audio evidence may have been "intentionally erased, which would in turn impune (sic) Agent[s] credibility both for the purposes of the Medical Board hearing and the DEA OSC hearing." Id. at 3.

Respondent further argued that the instant case is factually distinguishable from the DEA decisions cited in Government's Motion for Summary Disposition because "in none of those cases was there credible evidence suggesting that the Department's agents had destroyed crucial evidence leading to the State Medical Board License Revocation Proceeding as well as the DEA Order to Show Cause." Id. Respondent contended that "[t]he DEA Administrative process has unique powers to compel the production of the [original recording and recording device] evidence that Respondent's counsel needs to inspect." Id. Finally, Respondent argued that "it is in the interest of justice for the [Agency] proceeding to determine whether ... agents submitted falsified evidence to the [MBC], which...would lead to a ruling that would give cause for the Medical Board to set aside its suspension as well as for the Department to keep Respondent's DEA certificate in force." Id.

On September 21, the Government filed a Response to Respondent's Amended Motion for Reconsideration, arguing that Respondent's assertion of good cause for his late submission of his opposition to its summary disposition motion was unpersuasive. Government Response to Motion for Reconsideration, at 1. The Government also argued that the evidentiary issues raised by Respondent are inapposite to the assertion that Respondent currently lacks authority to handle controlled substances in California, a fact which Respondent does not deny, and that therefore, he is not authorized to possess a DEA registration in that State. Government Response at 2 (citations omitted).

On September 22, 2011, the ALJ denied Respondent's motions. Ruling on Respondent's Amended Motion for Reconsideration-Exceptions to Order of Summary Disposition-Opposition To Motion For Summary Disposition, at 4. While the ALJ found that Respondent had demonstrated good cause for the late filing of his motions (due to "an inadvertent office management error" by his counsel), the ALJ found that his "request to set aside [the] previous ruling is without legal authority." *Id.* at 3. The ALJ further explained that "[a]lthough Respondent's arguments regarding the audio recording may be relevant at hearing, Respondent is not entitled to a hearing because he has failed to demonstrate that he has state authority to handle controlled substances." *Id.*

I need not decide whether Respondent established good cause³ for his failure to timely file an opposition to the Government's summary disposition motion because under the Administrative Procedure Act and DEA regulations, Respondent is entitled to file exceptions to the Administrative Law Judge's decision, which is only a recommendation. 5 U.S.C. § 557(c);

³But see *Kamir Garces Mejias*, 72 FR 54931, 54932 (2007) (quoting *De la Torre v. Continental Ins. Co.*, 15 F.3d 12, 15 (1st Cir. 1994) ("Respondent's claim 'that [her] attorney was preoccupied with other matters . . . has been tried before and regularly has been found wanting.' . . . 'Most attorneys are busy most of the time and they must organize their work so as to be able to meet the time requirements of matters they are handling or suffer the consequences.'") (quoting *Pinero Schroeder v. FNMA*, 5874 F.2d 1117, 1118 (1st Cir. 1978) (other citation omitted))).

21 CFR 1316.66. Under the Agency's rule, exceptions must be filed within twenty days after the date on which the recommended decision is served and there is no dispute that Respondent's pleading, which he also titled as exceptions, was timely filed. 21 CFR 1316.66(a). Thus, I will consider Respondent's post-ruling motions as timely filed exceptions to the ALJ's recommended decision.

As noted above, in his Exceptions, Respondent argues that the MBC's Interim Suspension Order (Suspension Order) and this Agency's subsequent Order to Show Cause is based on the allegation that he prescribed Vicodin to a DEA Special Agent "without an adequate examination." Exceptions at 2. Respondent maintains that "the crucial events of [the Agent's] conversations with Respondent are somehow 'missing' from the audio recording" of the Agent's visit and that a copy of an audio recording of the visit "contains a number of serious abnormalities that preclude [its] authentication." Id. at 3.

Respondent thus raises the specter of Government misconduct arguing that there is "credible evidence suggesting that the Department's agents ha[ve] destroyed crucial evidence leading to the State Medical Board License Revocation Proceeding." Id. Respondent then contends that "[i]f indeed government Agents were actively involved in the destruction of evidence . . . leading to the license revocation action which forms the basis for the Motion for Summary Disposition, it is in the interest of justice for [the DEA] proceeding to determine whether the Department's agents submitted falsified evidence to the [MBC] which, if further explored through the discovery process, would lead to a ruling that would give cause for the [MBC] to set aside its suspension as well as for the [Agency] to keep Respondent's DEA certificate in force." Id.

This fishing expedition cannot leave the dock, however, for two reasons. First, Respondent's license remains subject to the interim order of the MBC which suspended his California Physician and Surgeon's Certificate. As explained in the ALJ's decision, this action, which is undisputed, rendered Respondent without authority to dispense controlled substances in the State in which he practices medicine and holds his DEA registration, and thus he no longer meets an essential condition for holding a registration. See 21 U.S.C. § 824(a)(3) (authorizing revocation of registration based "upon a finding that the registrant . . . has had his State license . . . suspended [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances"); see also *id.* § 802(21) (defining "the term 'practitioner' [to] mean[] a . . . physician . . . or other person licensed, registered or otherwise permitted, by . . . the jurisdiction in which he practices . . . to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice"); *id.* § 823(f) ("The Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.").

Second, Respondent's contention is a collateral attack on the validity of the MBC's Suspension Order. However, DEA has held repeatedly that a registrant cannot collaterally attack the result of a state criminal or administrative proceeding in a proceeding under section 304, 21 U.S.C. § 824, of the CSA. Calvin Ramsey, 76 FR 20034, 20036 (2011) (other citations omitted); Brenton D. Glisson, 72 FR 54296, 54297 n.2 (2007); Shahid Musud Siddiqui, 61 FR 14818, 14818-19 (1996). Rather, Respondent's various challenges to the validity of the MBC's Suspension Order must be litigated in the forums provided by the State of California. Thus, Respondent's contentions regarding the validity of the MBC's Suspension Order are therefore

not material to this Agency's resolution of whether he is entitled to maintain his DEA registration in California.

Because it is undisputed that Respondent currently lacks authority to dispense controlled substances in California, the State in which he holds his DEA registration, Respondent is not entitled to maintain his registration. Accordingly, I adopt the ALJ's recommended decision and will order that Respondent's registration be revoked and that any pending application be denied.

ORDER

Pursuant to the authority vested in me by 21 U.S.C. §§ 823(f) and 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration BL7325079, issued to Zhiwei Lin, M.D., be, and it hereby is, revoked. I further order that any pending application of Zhiwei Lin, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.⁴

Dated:

March 20, 2012

Michele M. Leonhart
Administrator

⁴ For the same reasons that the State imposed its emergency suspension of Respondent's medical license, I conclude that the public interest requires that this Order be effective immediately. 21 CFR 1316.67.

Christine Menendez, Esq., for the Government
Alan I. Kaplan, Esq., for the Respondent

**RECOMMENDED RULING, FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Timothy D. Wing, Administrative Law Judge. This proceeding is an adjudication governed by the Administrative Procedure Act, 5 U.S.C. § 551 et seq., to determine whether a practitioner's Certificate of Registration (COR) with the Drug Enforcement Administration (DEA, Government or Agency) should be revoked and any pending applications for renewal or modification of that registration denied. Without this registration, Zhiwei Lin, M.D. (Respondent), would be unable to lawfully possess, prescribe, dispense or otherwise handle controlled substances.

I. PROCEDURAL POSTURE

On August 8, 2011, the Deputy Assistant Administrator, DEA, issued an Order to Show Cause (OSC) of DEA COR BL7325079. The OCS provided notice to Respondent of an opportunity to show cause as to why the DEA should not revoke Respondent's DEA COR BL7325079, pursuant to 21 U.S.C. § 824(a)(4), and deny any pending applications for renewal or modification, on the grounds that Respondent's continued registration would be inconsistent with the public interest under 21 U.S.C. § 823(f). On September 2, 2011, Respondent, through counsel, in a letter dated August 31, 2011, timely requested a hearing with the DEA Office of Administrative Law Judges.

I issued an Order for Prehearing Statements on September 6, 2011.

On September 12, 2011, the Government filed a Motion for Summary Disposition, with a copy served on Respondent via U.S. mail. (Mot. at 3.) Pursuant to the September 6, 2011 Order for Prehearing Statements, Respondent had "until 4:00 p.m. EDT three business days after the

date of service of any motion to file a responsive pleading. . . . In the absence of good cause, failure to file a written response to the moving party's motion after three business days will be deemed a waiver of objection." (Order for Prehearing Statements at 3.)

As of September 19, 2011, five business days after service of the Government's Motion for Summary Disposition, Respondent had not yet filed a response. While not dispositive, Respondent is deemed to have waived any objection to the Government's motion.

II. THE PARTIES' CONTENTIONS

A. The Government

In support of its Motion for Summary Disposition, the Government asserts that on July 28, 2011, the Medical Board of California issued an Interim Suspension Order suspending Respondent's medical license, and that Respondent consequently lacks authority to handle controlled substances in California, the jurisdiction in which he maintains his DEA registration. (Mot. at 1.) The Government contends that such state authority is a necessary condition for maintaining a DEA COR and therefore asks that I summarily recommend to the Administrator that Respondent's COR be revoked and any pending applications for renewal or modification be denied. (Mot. at 1-2.) In support of its motion, the Government cites Agency precedent and attaches the Interim Suspension Order issued by the Medical Board of California, marked for identification as Exhibit B.

B. Respondent

As noted above, Respondent did not respond to the Government's Motion for Summary Disposition, or seek an extension within the deadline for response, and is therefore deemed to waive objection.

III. DISCUSSION

At issue is whether Respondent may maintain his DEA COR given that California has suspended Respondent from the practice of medicine or surgery.

Under 21 U.S.C. § 824(a)(3), a practitioner's loss of state authority to engage in the practice of medicine and to handle controlled substances is grounds to revoke a practitioner's registration. Accordingly, this Agency has consistently held that a person may not hold a DEA registration if he is without appropriate authority under the laws of the state in which he does business. See Scott Sandarg, D.M.D., 74 Fed. Reg. 17,528 (DEA 2009); David W. Wang, M.D., 72 Fed. Reg. 54,297 (DEA 2007); Sheran Arden Yeates, M.D., 71 Fed. Reg. 39,130 (DEA 2006); Dominick A. Ricci, M.D., 58 Fed. Reg. 51,104 (DEA 1993); Bobby Watts M.D., 53 Fed. Reg. 11,919 (DEA 1988).

Summary disposition in a DEA suspension case is warranted even if the period of suspension of a respondent's state medical license is temporary, or even if there is the potential for reinstatement of state authority because "revocation is also appropriate when a state license had been suspended, but with the possibility of future reinstatement." Stuart A. Bergman, M.D., 70 Fed. Reg. 33,193 (DEA 2005); Roger A. Rodriguez, M.D., 70 Fed. Reg. 33,206 (DEA 2005).

It is well-settled that when no question of fact is involved, or when the material facts are agreed upon, a plenary, adversarial administrative proceeding is not required, under the rationale that Congress does not intend administrative agencies to perform meaningless tasks. See Layfe Robert Anthony, M.D., 67 Fed. Reg. 35,582 (DEA 2002); Michael G. Dolin, M.D., 65 Fed. Reg. 5661 (DEA 2000); see also Philip E. Kirk, M.D., 48 Fed. Reg. 32,887 (DEA 1983), aff'd sub nom. Kirk v. Mullen, 749 F.2d 297 (6th Cir. 1984). Accord Puerto Rico Aqueduct & Sewer Auth. v. EPA, 35 F.3d 600, 605 (1st Cir. 1994).

In the instant case, the Government asserts, and Respondent does not contest, that Respondent's California license to practice medicine and surgery is presently suspended. This allegation is confirmed by Government Exhibit B. I therefore find there is no genuine dispute as to any material fact, and that substantial evidence shows that Respondent is presently without state authority to handle controlled substances in California. Because "DEA does not have statutory authority under the Controlled Substances Act to maintain a registration if the registrant is without state authority to handle controlled substances in the state in which he practices," Sheran Arden Yeates, M.D., 71 Fed. Reg. 39,130, 39,131 (DEA 2006), I conclude that summary disposition is appropriate. It is therefore

ORDERED that the hearing in this case, scheduled to commence on November 15, 2011, is hereby **CANCELLED**; and it is further

ORDERED that all proceedings before the undersigned are **STAYED** pending the Agency's issuance of a final order.

RECOMMENDED DECISION

I grant the Government's Motion for Summary Disposition and recommend that Respondent's DEA COR BL7325079 be revoked and any pending applications denied.

September 19, 2011

s/Timothy D. Wing
Administrative Law Judge

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